(37)

IN THE

Supreme Court of the United States

Term.

No. 1196. 143

MOE HENRY HANKIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari.

JOSEPH L. PRINCE,
MOE HENRY HANKIN,
IRA JEWELL WILLIAMS, JR.,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States.

Term, 194 .

No.

MOE HENRY HANKIN,
Petitioner,

v.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Moe Henry Hankin, appellee in the Court below, respectfully prays that a writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled cause on the 22nd day of March, 1944. A petition for rehearing was filed on the 4th day of April, 1944, and a rehearing was denied by said Court on the 24th day of April, 1944, and the Judgment of said Court is final.

Opinions Below.

The Circuit Court of Appeals for the Third Circuit rendered an opinion in the case, which was filed on March 22, 1944. A copy of said opinion is fully set forth in the appendix hereto. An opinion by the District Court which was filed August 5, 1943 is reported at 50 F. Supp. 996 (218a).[1]

[1] Page references "a" are to the appendix of the record used in the Circuit Court of Appeals.

Jurisdiction.

The jurisdiction of this Court to issue the writ of Certiorari herein prayed for, is invoked under Judicial Code, Sect. 240 (a) as amended by the Act of February 13, 1925, 43 Stat. 938 (U. S. C. Title 28, Sect. 347).

Statutes Involved.

The statutes involved are (1) Act of August 1, 1888, (25 Stat. 357, 40 U. S. C. sec. 257) known as the General Condemnation Act; (2) the Declaration of Taking Act of February 26, 1931, (46 Stat. 1421, 40 U. S. C. sec. 258 (a); (3) and the Appropriation Acts of December 17, 1941, 55 Stat. 815 and December 26, 1941, 55 Stat. 862.

Summary Statement of the Matter Involved.

This is an application for a writ of Certiorari to the Circuit Court of Appeals for the Third Circuit to review a judgment dated March 22, 1944, reversing a judgment of the United States District Court for the Eastern District of Pennsylvania dated October 14, 1943 (223a).

The United States on March 22, 1942, filed a Declaration of Taking for a quantity of land in Montgomery County, Pennsylvania, and judgment thereon was filed the same day (26a). As a result of the condemnation the petitioner, Moe Henry Hankin, lessee, (33a) of a tract of land so taken has suffered the destruction of a grain and straw crop (44a).

A Board of Review on January 27, 1943 reported a finding of damages in the amount of $3400 (39a) and the petitioner appealed.

At a jury trial before the United States District Court on April 26, 1943, evidence was introduced to show that in the fall of 1941, the petitioner sowed 95.9 acres of grain—namely 40 acres of wheat and 55.9 acres of grain mixture, comprising 75% wheat and 25% rye. (56a, 164a.) The soil was of good fertility and had been carefully prepared,

(68a, 117a, 120a, 138a), that a high quality of seed and fertilizer were used. (138a.) That the wheat was in good condition at the time of the taking on March 23, 1942. (18a, 72a, 92a, 122a, 141a, 165a.) There was also testimony as to the estimated yield of wheat, mixed grain and straw (74a-76a, 101a, 126a, 145a, 167a) and as to the cost of harvesting and marketing the crops. (96a-98a, 127a-130a, 146a-148a, 167a-170a.)

The evidence showed that the average market price of wheat was $1.20 a bushel at harvest time, in August of 1942 (156a), and $1.51 in January of 1943 at Philadelphia, Pa. (156a). That the price of the mixed grain would be about 2 cents per bushel less than the wheat. (158a.) There was testimony as to the market value of straw in August 1942 (153a) and in January 1943 (149a).

There was evidence as to the favorable weather conditions in the summer of 1942 and that there was no disease or pestilence (126a). There was evidence to show that there was no market price for growing immature grain crops in this locality during March 1942 nor at any time. (184a-186a; 150a.)

The most important evidence produced upon which this case turns is that it was the sound business practice and custom of both the petitioner and the farmers in this locality to keep part of the grain for seed and to sell the balance of their grain and straw crops during the month of January of every year—the market season. (110a, 131a, 170a.) There was evidence that this grain could not be bought in this locality except during the customary market season, namely January of each year. (104a, 220a.)

The respondent objected to the admission of the January prices as going beyond the harvest period (109a). However, the Court overruled the objection (110a, 131a) on the theory that since it was an established custom for the farmers in that locality to sell their wheat in January, the petitioner would not be fairly compensated unless consideration were given to the market value at the time he

would have sold his crops, as well as to the market value at the time of the harvest—as both reflected the market value of the growing crop at the time of the taking March 22, 1942. (104a, 222a.)

The respondent renewed its objection to the consideration of the January prices in its requested points for charge (215a) and again in its motion for a new trial (217a) after the jury had returned a verdict for $6,169.37 (211a). On August 5, 1943, the Court denied the motion for a new trial (222a) and filed a written opinion (218a-222a) reported at 50 F. Supp. 996. Judgment was entered on the jury verdict on October 14, 1943 (223a) and respondent appealed to the Circuit Court.

On March 22, 1944, the United States Circuit Court of Appeals for the Third Circuit filed an opinion which reversed the judgment of the United States District Court and remanded the case for further proceedings. The main reason for the Circuit Court's reversal was that "the admission of evidence concerning January prices of grain was erroneous and that it necessarily got the jury's attention away from the elements of compensation proper for their consideration."

On April 4, 1944, the petitioner filed a petition with the Circuit Court for a rehearing and a rehearing was denied by said Court on April 24, 1944.

Questions Involved.

1. Where there is no market value of a growing and immature crop at the time of a taking under a federal condemnation, is it proper to take into consideration both the average market price at harvest season and the average market price at the customary market season as reflecting the market value at the time of the taking, or are we limited to the average market prices at harvest period?

2. May the United States Circuit Court of Appeals in the case of condemnation under federal law, as to matters of compensation, make any analogy to tortious cases aris-

ing among the states, when the law as laid down in *United States v. Miller*, 317 U. S. 369, (1943) provide that matters of compensation are substantive and not procedural and hence the federal law is applicable?

3. Was the District Court correct in refusing to admit evidence as to the cost of planting the grass seed where there is no evidence as to whether such obligation exists?

4. In realty, the law is well settled that in ascertaining the market value at the time of taking under a federal condemnation consideration is given to the uses and purposes for which the property is adopted in the near future; is the law any different when it comes to growing immature crops?

Reasons for Allowance of the Writ.

I.

The decision of the Circuit Court of Appeals for the Third Circuit in this case is inconsistent and in conflict with the law as laid down by the Supreme Court of the United States.

A. The fifth amendment of the Federal Constitution provides, "that private property shall not be taken for public use without just compensation." "Just compensation" has been consistently held to be, by the long line of United States Supreme Court cases including the two most recent—"the market value of the property at the time of the taking." *United States v. Miller*, 317 U. S. 369 (1943); *United States ex rel. T. V. A. v. Powelson*, 319 U. S. 266 (1943).

The date upon which this leasehold or grain crop was taken was March 22, 1942 (26a) (Leasehold's main item was grain crop as entire farm was planted in grain).

However since there was no market value of the crop as such, on March 22, 1942, (184a-186a; 150a) the Circuit Court has clearly erred in stating that the market value of the harvested crop in August 1942, the time of the har-

vest should be taken into consideration, while the market value of the same crop during the customary sale season namely January, 1943 should not.

The reason for the Circuit Court's holding is as follows: "Since as a practical matter that value (referring to market value of the leasehold at the time of taking) cannot be actually determined, the nearest time thereafter when a value can be placed upon the crops is considered."

The Circuit Court is departing from the strict rule, as laid down by the Supreme Court decisions, that it is the time of the taking that governs; instead they lay down a rule that where there is no market value at the time of the taking it is some other time that governs, namely the closest time from the date of taking when a market value can be ascertained.

Surely it is not the element of how soon after the taking a price can be put on the harvested crop that reflects the value of the crop at the time of the taking but rather all the elements of value which attach to this particular crop and which directly affected the value at the time of the taking. *United States v. Miller*, 317 U. S. 369.

Although the Circuit Court's standard is convenient and easy to apply, it is in complete disregard of a proper evaluation of all the elements which should be considered in determining the value of the leasehold of the time of taking.

Clearly willing, prospective buyers and sellers of this crop on March 22, 1942 would take into consideration both, first, the expected market value of the crop as of harvest period—August, 1942, and second, the expected market value of the same crop in January, 1943—the customary sale period of this crop.

Clearly, both of these prices reflected the market price of the growing crop on March 22, 1942. Surely if any of these two prices reflect the price of the growing crop at the time of the taking, it is the second, namely, January 1, 1943, more so than the first, as the important factor in this

case which appears to have been overlooked by the Circuit Court is the fact that it is the practice in this community to keep part of the grain for seed and to sell the balance of the crop in January.

A buyer of this leasehold on March 22, 1942, would take this important element into consideration as it also reflects and helps to determine the market value of the growing crop on March 22, 1942.

Even if we take the reasoning of the Circuit Court that "the nearest time thereafter when a market value can be placed upon the crops is considered" the Circuit Court has made a grievous error in applying the reasoning to the set of facts.

The facts are uncontradicted as the record disclosed that this grain was of a particular kind and quality namely Leep's Prolific wheat with a slight mixture of Pa. 34 (137a), and could not be bought on the open market in this locality, except during January of each year. To apply the Circuit Court's reasoning, it would be January, 1943, and not July, 1942, as the market time when a market price could first be put on the crop—as January, 1943, would be the first time that this particular type of wheat would be sold on open market in this locality.

However, the petitioner contends that the United States District Court was correct in the charge to the jury that both the market prices of a crop similar as possible to this crop in quality in August, 1942, and the market prices of this crop in January, 1943, the customary sale period for this crop in the community were two elements which helped to reflect and have a direct bearing on the value of the growing crop as of March 22, 1942.

To hold, as the Circuit Court held, to permit evidence of the August price and not the January price when as a matter of fact both help to reflect the market value of the leasehold in March, 1942, was error and arbitrary.

Furthermore the Circuit Court overlooked the important fact that although the lease expired at the end of the harvest period, the leasehold had certain attached interests which did not expire at harvest time with the lease. Such attached interests were the right of the petitioner to take his grain with him and use a substantial part of it for seed in the fall and sell the balance during the customary sale season in January, 1943 (110a, 131a, 170a).

II.

Since this is a taking under Federal Law the Rules of Conflicts of Law as laid down in *United States v. Miller*, 317 U. S. 369, and in Goodrich's "Conflict of Law," 2nd Edition, 1938, Chapter 5, Sec. 7, provide that matters of compensation are substantive and not procedural, hence the federal law is applicable, and the analogy made by the Circuit Court to tortious cases arising among the States is prejudicial to petitioner's case.

III.

The District Court was correct in refusing to admit evidence as to the cost of planting the grass seed since no evidence was introduced to establish such an obligation. The written lease speaks for itself (33a) and any legal interpretations which either petitioner or respondent inject which are not correct have no binding effect (170a).

IV.

The United States Supreme Court has expounded the proposition in many cases that in matters of federal condemnation of realty, in ascertaining the market value at the time of the taking, consideration must be given for all available uses and purposes to which the property may be used in the near future. In *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, the Court said "The owner must be compensated for what is taken from him but that is

done when he is paid its market value for all available uses and purposes." The Supreme Court of United States has also said "As a general rule, compensation to the owner is to be estimated by reference to the uses for which the appropriated lands are suitable, having regard to the existing business or wants of the community or such as may be reasonably expected in the immediate future." *Boom Company v. Patterson*, 98 U. S. 403. *McCandless v. United States*, 298 U. S. 342 (1936). *Olson v. U. S.*, 292 U. S. 246 (1934).

In the *McCandless* case, the owner of a plantation upon which most of the land was used for grazing was permitted to show that he had a plan whereby he was going to irrigate the plantation and raise sugar cane. The court held that this evidence was admissible to reflect the market value at the time of the taking. The court held, "In condemnation cases the most profitable use to which the land can probably be put in the reasonably near future may be shown and considered as bearing upon the market value." The court even went further and said "And the fact that such use can be made only in connection with other lands does not necessarily exclude it from consideration if the possibility of such connection is reasonably sufficient to affect market value." *McCandless v. United States, supra.* The same idea was expounded in *United States ex rel. T. V. A. v. Powelson*, 319 U. S. 266 (1943). The court there held "That value may reflect not only the use to which the property is presently devoted but also, that use to which it may be readily converted." The court further said "In that connection the value may be determined in light of the special or higher use of the land when combined with other parcels; it need not be measured merely by the use to which the land is or can be put as a separate tract."

The Supreme Court of the United States has definitely held in all these cases that the various uses and purposes for which land may be used in the near future is admissible in reflecting the market value at the time of the taking.

Is the rule any different when we come to growing immature crops where there is no market value at the time of the taking? The Circuit Court's decision would seem to be in the affirmative, as they said it was error to introduce evidence as to value beyond the harvest period, even though the uses and purposes for which this crop was raised extended beyond the harvest season (105a, 170a).

This crop was raised for uses and purposes which extended beyond the harvest period, namely for seed to be used in the fall and also for the sale during the market season in this locality—January, 1943. Buyers and sellers would take these uses and purposes in consideration in buying the growing crop at the time of the taking—namely March 22, 1942. Since these uses and purposes are elements of value as it is in realty, the petitioner strongly contends that it was proper to consider them as reflecting the value at the time of the taking.

Although there are many cases on point as regard federal condemnation of realty as was outlined above, yet it is your petitioner's belief that this is a case of first impression before the Supreme Court of the United States on the question of growing and immature crops which have no market value at the time of the taking.

Since there are many federal condemnations today as a result of which growing crops are destroyed, this matter is of great importance because of the issues involved. The issues herein affect the farmers vitally and since public welfare depends so much upon the farmer both in Peace and War, your petitioner prays for a Writ of Certiorari for the sake of national interests.

Your petitioner presents to this Court and files herewith a duly certified transcript of the entire record of the case as the same appears in the Circuit Court of Appeals for the Third Circuit.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court to the Circuit Court of Appeals for the Third

Circuit, to the end that the judgment of said Circuit Court of Appeals for the said Circuit may be reviewed by this Honorable Court.

MOE HENRY HANKIN,
Petitioner.

JOSEPH F. PRINCE,
MOE HENRY HANKIN,
IRA JEWELL WILLIAMS, JR.,
Counsel for Petitioner.

Appendix.

UNITED STATES CIRCUIT COURT OF APPEALS.
FOR THE THIRD CIRCUIT.

No. 8502. October Term, 1943.

UNITED STATES OF AMERICA,

v.

576.734 ACRES OF LAND, MORE OR LESS IN MONTGOMERY COUNTY, COMMONWEALTH OF PENNSYLVANIA, ARTHUR JARRETT, ET AL.

MOE HENRY HANKIN,

v.

UNITED STATES OF AMERICA,
Appellant.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Before MARIS, GOODRICH and MCLAUGHLIN, *Circuit Judges.*

OPINION OF THE COURT.

(Filed March 22, 1944.)

By GOODRICH, *Circuit Judge.*

This is an appeal by the United States from a judgment of the District Court in favor of Moe Henry Hankin, the appellant alleging error in the admission of certain testimony and the exclusion of other testimony in the course of the trial.

The United States on March 23, 1942, filed a Declaration of Taking for a quantity of land in Montgomery County, Pennsylvania, and judgment thereon was filed the same day. The land was taken for the establishment of a Naval Reserve Aviation base. A portion of the land in question consisted of a tract known as the Kates Farm of some one hundred acres. The land was, at the time of taking, under lease to Moe Henry Hankin who had, at the time, a growing crop of grain on the land which had been planted the autumn before. The lessor settled with the government at a mutually agreed price for the farm, exclusive of the lessee's interest. The lessee and the government did not come to a settlement and the lessee, rejecting the report of the Board of View, brought his action in the District Court.

What the government took and was under obligation to pay for was the entire tract.[1] But since settlement had been made with the owner of the fee, the subject of litigation here was the value of that portion of the entire tract represented by the lessee's interest. There was no evidence of the value of the lease as such. Lacking that, other means of proof were properly resorted to.[2] The testimony covered the nature of the soil, the condition of the growing crop in March, the crop history for the year of neighboring farms and estimates of the cost to the tenant of producing the crop. Harvest time for the grain on this land, and similar grain on neighboring lands, was August. Testimony was admitted of prices prevailing for such grain at that time.

The first point of the government's appeal is based on a dispute as to how far such proof may properly go. The lessee offered evidence that it was customary for farmers in this neighborhood to hold their grain until January for better prices and then offered testimony showing the prices for grain in January, 1943. This the court permitted over objection by the government. We think the admission of

[1] United States v. Dunnington, 146 U. S. 338, 351 (1892); Orgel, Valuation Under Eminent Domain (1936) § 107; 2 Lewis, Eminent Domain (3rd Ed. 1909) § 716.

[2] United States v. Miller, 317 U. S. 369, 374 (1943).

this testimony was erroneous and that the error was substantial.

The basic question to be determined was the value of the tenant's lease. The chief item in that value was the worth of the growing crop on March 23, 1942. The evidence concerning the nature of this piece of land, plus the history of growing crops in the neighborhood for that season was only relevant in so far as it gave a basis for determining the value of that crop on March 23. The United States was not obligated to pay for a matured crop; its obligation was limited to the value of the leasehold on the day of taking.[3]

An analogy is found in the cases dealing with the tortious destruction of growing crops. The basis of compensation is the value of the unmatured crop at the time it is destroyed.[4] But since it is not customary to buy or sell growing crops as such, no effective market value, in this sense, ordinarily exists. The formula adopted has been to take evidence on the probable yield and value of the crop when harvested at maturity and the cost of further care and cultivation, harvesting and marketing the crop, in order to determine the actual realizable value of the crop when destroyed; or what the crop when harvested would have brought, less the prospective cost of cultivation, harvesting and marketing.[5] In allowing such evidence, many decisions state that the market value of the yield to be considered is the market value "when", "at the time" or "at" maturity or harvesting and gathering of the crop.[6] This limitation is a reasonable one, for, it must be remembered, the general rule is that the measure of damages is the value of the crops at the time of injury or destruction. Since as

[3] Danforth v. United States, 308 U. S. 271, 283-284 (1939); United States v. Miller, supra.

[4] McCormick, Damages (1935) 486.

[5] Id. at 487; 4 Restatement, Torts (1939) § 929, comment d.

[6] See for example, United States Smelting Co. v. Sisam, 191 Fed. 203 (C. C. A. 8, 1911); United Verde Copper Co. v. Ralston, 46 F. (2d) 1 (C. C. A. 9, 1931); Peppers Fruit Co. v. Charlebois, 39 Ariz. 195, 4 P. (2d) 905 (1931); Teller v. Bay & River Dredging Co., 151 Cal. 209, 90 Pac. 942 (1907); Lester v. Highland Boy Gold Min. Co., 27 Utah, 470, 76 Pac. 341 (1904).

a practical matter that value cannot be actually determined, the nearest time thereafter when a market value can be placed upon the crops is considered. The same limitation applies in the instant case.

The lessee argues that he is entitled to be paid for the most profitable use to which the property taken could be put, and that January prices of the grain harvested represent what could be done in the way of such profitable use. One answer to this contention is the rule already mentioned, that damages are paid for value of the property at the time of the taking. The other answer is that the United States did not take the farmer's grain as such. It took a leasehold and we are only interested in the value of the crop at maturity in so far as it helps establish the value of the leasehold at the time of taking. The taking itself in no way concerned what this leaseholder or any other might make as a warehouseman of grain held for favorable market.

We conclude that the admission of the evidence concerning January prices of grain was erroneous and that it necessarily got the jury's attention away from the elements of compensation proper for their consideration.

The United States also objects to the trial court's refusal to admit testimony concerning the cost to the lessee of the labor of planting the land with grass. Covenant 6 in the lease between them provides that: "Lessee agrees to sow grass seed but it is clearly understood that Lessor is to buy the grass seed at Lessor's expense and to furnish the grass seed when Lessee is ready to plant said wheat." Bearing in mind that the question at issue is the value of the lease, we think that the cost of sowing the seed in relevant. It makes the lease a more valuable thing to the lessor and a less valuable thing to the lessee just as clearly as if the lessee had promised to give the lessor a fraction of the crop. Whether the lessor had provided the grass seed so as to bring the lessee's obligation into effect we do not know. Since the case must go back for a new trial, the existence of such a burden upon the lessee, if it existed, may be developed.

The judgment of the District Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

A true Copy:
Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

JUL 24 1944
CHARLES ELMORE CROPLEY

No. 148

In the Supreme Court of the United States

OCTOBER TERM, 1944

ON PETITION FOR WRIT OF CERTIORARI TO THE [illegible] STATES CIRCUIT COURT OF APPEALS FOR THE [illegible] CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 143

MOE HENRY HANKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 218–222) is reported in 50 F. Supp. 996. The opinion of the circuit court of appeals (R. 229–232; Pet. 13–17) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered on March 22, 1944 (R. 232–233). The petition for a writ of certiorari was filed on June 8, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, in determining the enhancement value of a tenant's growing crops destroyed in taking possession of condemned land, it is improper to consider the market value of similar crops six months after maturity.

2. Whether the cost of planting grass as required by a lease is a proper matter for consideration in awarding just compensation for the lessee's interest.

STATEMENT

This case arose from condemnation proceedings instituted by the United States to acquire 576 acres of land in Montgomery County, Pennsylvania, for use as a Navy airport (R. 4–21). A declaration of taking was filed on March 23, 1942 (R. 23–25), and the United States took immediate possession (R. 28). One of the tracts so taken was a farm of approximately 100 acres which, excluding the dwelling and other buildings, was under lease to petitioner for a term from April 1941 to the end of the summer of 1942, when the crop of fall wheat planted thereon would in normal course have been harvested (R. 33–34). Upon harvesting the wheat, petitioner by his own admission would have been obligated by the terms of the lease to sow the farm in grass (R. 33, 170). However, because of the taking petitioner lost the benefit of his lease and was unable to harvest his wheat (R. 44). The Gov-

ernment and the owner of the fee arrived at a settlement as to the value of the entire farm, exclusive of petitioner's leasehold interest (R. 36, 229), so that with respect to this tract the only issue left in the condemnation proceeding was the amount of just compensation payable to petitioner for the taking of his leasehold interest.

During November and December 1942, under Pennsylvania law,[1] a Board of View held hearings to determine the value of the leasehold (R. 35, 37) and on January 27, 1943, reported a finding of damages in the amount of $3,400 (R. 39), from which finding petitioner appealed (R. 41–42). At the jury trial which followed, no evidence was presented as to the market value of the leasehold as such on the date of taking, and petitioner proceeded to establish his claim in accordance with the prevalent rule of damages applicable in cases of tortious destruction of growing crops (R. 44–45, 212–213). Evidence was adduced tending to show that in the fall of 1941, petitioner had planted part of the farm in pure wheat and part in a mixture of wheat and rye (R. 56, 164), that the soil was of average fertility and had been carefully prepared (R. 68, 117, 120, 138), that a high-grade seed had been used (R. 102–103, 138, 164), and that the wheat was in good condition at the time of taking on March 23, 1942, (R. 68, 72, 92, 122, 141, 165). There also was testimony as to the esti-

[1] Purdon's Penna. Stats. Ann. 211.

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mated yield of wheat, mixed grain, and straw (R. 74–76, 101, 126, 145, 167) and as to the cost of harvesting and marketing the crops (R. 96–98, 127–130, 146–148, 167–170). However, the court refused to receive testimony as to the cost of sowing grass, on the ground that this requirement of the lease did not affect the value of the wheat (R. 171).

The harvest period for fall wheat in the locality extended from about July 4 to the first part of August (R. 99, 168), but it was an established custom for the farmers in the vicinity to hold their wheat for the higher winter prices rather than sell at harvest time (R. 104–105, 110, 129–130, 170). The average market price of wheat was $1.12 per bushel during July 1942 and $1.20 during August, while during January 1943 it was $1.51 (R. 156). There were similar variations in the prices of mixed grain and straw (R. 101, 149, 151–154, 158–159), the winter prices being approximately 30% greater than those at harvest. The Government objected to the admission of the January prices as going beyond the harvest period (R. 109, 130). The court overruled the objection on the theory that, since it was an established custom to hold wheat for the winter prices, petitioner would not be fairly compensated unless consideration were given to the market value at the time he would have sold his crop (R. 110, 131, 222). The jury was instructed that in computing the value of the crop they should use the

highest price between harvest time in 1942 and January 1943 (R. 207). The jury returned a verdict for $6,169.37 (R. 211) and the United States appealed (R. 224), assigning as errors the admission of testimony of January prices and the exclusion of testimony of the cost of sowing grass (R. 225).

The circuit court of appeals reversed, holding that, since the basic question was the value of the lease and since the value of crops was material only as it helped establish the value of the leasehold at the time of taking, any separate valuation of crops should be limited to the earliest time at which they would have a market value (R. 230–231). The court also held that the cost of sowing grass was relevant to the value of the lease and that this issue should be more fully developed at a new trial (R. 232).

ARGUMENT

1. When, as here, there are separate estates or interests in land taken by condemnation, the amount of just compensation should be determined as if the property were in a single ownership, without reference to conflicting claims, and then apportioned among the parties according to their respective interests. *United States* v. *Dunnington,* 146 U. S. 338, 351; *Carlock* v. *United States,* 53 F. (2d) 926, 927 (App. D. C.). And the property should be valued as a unit, *i. e.,* as land as enhanced by the improvements thereon, without

separate appraisals of the elements, such as growing crops which may have bearing upon the unit valuation. *Morton Butler Timber Co.* v. *United States,* 91 F. (2d) 884, 888 (C. C. A. 6); *United States* v. *Meyer,* 113 F. (2d) 387, 397 (C. C. A. 7). However, here, because the valuation of the underlying fee exclusive of petitioner's interests had already been settled between the landowner and the Government, the sole issue which remained was the market value of petitioner's leasehold on March 23, 1942, the date of taking. *United States* v. *Miller,* 317 U. S. 369, 374. In the instant case, the chief item in the value of the lease was the worth of the growing wheat. But, nevertheless, the measure of just compensation would be determined by "what a willing buyer would pay in cash to a willing seller" for the leasehold interest as of the date of taking. *United States* v. *Miller, supra.* Petitioner is not entitled to be compensated for the growing crops as such, but only to the extent which the growing crops "enhanced the market value of the lease over and above the obligations of the lease." Cf. *Carlock* v. *United States,* 53 F. (2d) 926, 927 (App. D. C.).

In the absence of evidence as to the market value of the lease as such, it was necessary to resort to other means of proof. *United States* v. *Miller, supra.* Substantial justice was done by adopting the rule of tort law that, when growing crops are tortiously destroyed, the value of the

crops as of the date of destruction is determined after a consideration of the value of the potential yield at harvest time less the cost of further cultivation, harvesting, and marketing the crop. (See *United States Smelting Co.* v. *Sisam,* 191 Fed. 293 (C. C. A. 8); *United Verde Copper Co.* v. *Ralston,* 46 F. (2d) 1 (C. C. A. 9).)[2] However, since the worth of the crop at any time would be material only insofar as it helped establish the value of the leasehold at the time of taking, it would be erroneous to consider the crop prices in January 1943, six months after harvest and almost a year after the taking. The increase in value which would have accrued to petitioner by holding the crops for the higher winter prices would be nothing more than the profit resulting from a purely commercial transaction having only the remotest connection with the lease, which expired at harvest. It is true that because of the taking petitioner failed to make his expected profit. However, it was pointed out in *United States ex rel.*

[2] This theory of damages is in accord with the general rule that damages for the destruction of any legally protected interest are measured by the highest market value within a reasonable time after the time of destruction, the damages being the cost of replacement to avoid a loss or retain a profit. See 4 Restatement, Torts (1939), sec. 927, comment e. Petitioner's contention (Pet. 7) that January 1943, rather than harvest time, was the earliest time at which his wheat would have a market value is without merit. Although his wheat was of a particular quality, it was sold as No. 2 wheat (R. 103, 138, 156). Wheat of this quality was readily available at harvest time in the nearby Phailadelphia market (R. 156).

T. V. A. v. *Powelson,* 319 U. S. 266, 281–282, that there are numerous business losses which result from the condemnation of properties but which are not compensable under the Fifth Amendment, and that in the absence of a statute to the contrary the sovereign must pay only for what it takes, not for opportunities which the owner may lose. See also *Omnia Co.* v. *United States,* 261 U. S. 502, 513. Thus, when the United States condemned this land, it did not incur the liability of compensation for the loss of profits which, but for the taking, would have been realized from the sale of crops growing thereon 2 Lewis, *Eminent Domain* (3d ed. 1909), sec. 724. The loss of profits was consequential damages for which there can be no recovery, since it was an unintended incident of the taking of land. Cf. *Mitchell* v. *United States,* 267 U. S. 341, 345.

Nor can petitioner's insistence that market prices in January 1943 must be considered be supported on equitable grounds. If the Government had requisitioned the wheat immediately after harvest, the amount of compensation would be the market value at that time. *United States* v. *Miller, supra; United States* v. *New River Collieries,* 262 U. S. 341. It would be unconscionable if the petitioner were permitted to receive a greater award for growing wheat still subject to the hazards of husbandry. And had petitioner desired to speculate on a possible increase in prices between harvest and his usual marketing

season, he could have acquired other comparable wheat in the Philadelphia grain market (R. 156).

Petitioner contends (Pet. 8–10) that unless the January 1943 prices are considered, he will not be compensated for the most profitable use to which the property taken could be put. Cf. *Boom Co.* v. *Patterson,* 98 U. S. 403; *McCandless* v. *United States,* 298 U. S. 342; *Olson* v. *United States,* 292 U. S. 246. This contention ignores the fact that it was a leasehold, and not growing crops as such, which was taken. The best and only available use of the leasehold interest was the raising and harvesting of a crop of wheat (R. 33). Since the lease expired in the summer of 1942, consideration of prices in January 1943 would result in compensation being paid for something more than the property taken. Cf. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 326. Furthermore, although an owner is entitled to compensation estimated with reference to his property's market value for its best available use, he is not entitled to compensation measured by market value at a subsequent date. *Olson* v. *United States,* 292 U. S. 246, 255–256.

Petitioner asserts (Pet. 8) that he was prejudiced by the Third Circuit's analogy to principles developed in tort cases in various states. It is not seen how the reference to general state law could be error. Cf. *Board of Comm'rs* v. *United States,* 308 U. S. 343, 349. In any event, the

analogy cannot be deemed prejudicial, since the court used the most liberal theory of damages applicable to growing crops.[3] Moreover, petitioner cannot now complain of this reasoning, for he relied upon the same analogy at the trial (R. 212–213).

2. By his own admission at the trial, petitioner was obligated to sow grass after the harvesting of the wheat crop (R. 170). A willing purchaser of the leasehold would take this obligation into consideration just as he would an obligation to turn over a part of the crop to the landlord. Therefore, the circuit court of appeals properly required that the existence of conditions bringing the obligation into effect and evidence as to the cost of sowing grass be developed at a new trial.

[3] The court did not adopt the law of Pennsylvania. If it had, petitioner would have been restricted to evidence of the value of the crops in the ground, without reference to prices of harvested crops, and his failure to produce such evidence would have been fatal to recovery. Cf. *Irwin* v. *Nolde*, 176 Pa. 594, 601; *Taylor* v. *Canton Township*, 30 Pa. Super Ct. 305, 311; *Andes* v. *Andes*, 114 Pa. Super. Ct. 165, 178–179; *Chesney* v. *Lehigh Valley Coal Co.*, 12 Pa. D. & C. 722, 723.

CONCLUSION

The decision below is correct and involves no conflict. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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